

STATE OF MICHIGAN
IN THE SUPREME COURT

LOUIS GHAFARI,

Plaintiff-Appellant,

-vs-

TURNER CONSTRUCTION COMPANY,

Defendant Cross-Plaintiff
Third-Party Plaintiff-Appellee,

-and-

HOYT, BRUM & LINK & GUIDELINE
MECHANICAL, INC.,

Defendants
Cross-Defendants-Appellees,

-and-

R.W. MEAD & SONS, INC. & CONTI ELECTRIC, INC.,

Third Party Defendants,

-and-

ACOUSTICAL CEILING & PARTITION CO.,

Defendant

-and-

THE EDISON INSTITUTE a/k/a HENRY
FORD MUSEUM & GREENFIELD VILLAGE,

Defendant Third Party Plaintiff,

LOUIS GHAFARI,

Plaintiff-Appellant,

-vs-

TURNER CONSTRUCTION COMPANY,

Defendant Cross-Plaintiff
Third-Party Plaintiff-Appellee,

-and-

Supreme Court No. 124786

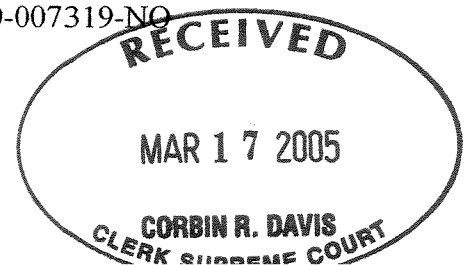
Court of Appeals No. 240025

Wayne County Circuit Court
No. 00-007319-NO

Supreme Court No. 124787

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No. 00-007319-NO



HOYT, BRUM & LINK

Defendant
Cross-Defendant-Appellee,

-and-

GUIDELINE MECHANICAL, INC. and

Defendant-Cross-Defendant,

-and-

ACOUSTICAL CEILING & PARTITION CO.,
Defendant

-and-

THE EDISON INSTITUTE a/k/a HENRY FORD
MUSEUM & GREENFIELD VILLAGE,

Defendant Third Party Plaintiff,

-and-

CONTI ELECTRIC, INC.,

Third Party Defendant,

_____ /

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction to review by appeal a case after a decision by the Court of Appeals. MCR 7.301(A)(2). On November 4, 2004, this Court granted the plaintiff-appellant's application for leave to appeal from the Court of Appeals' September 25, 2003 opinion.

STATEMENT OF THE QUESTIONS PRESENTED

I.

SHOULD THE OPEN AND OBVIOUS DANGER DOCTRINE HAVE ANY APPLICATION IN A CLAIM UNDER THE COMMON WORK AREA DOCTRINE DESCRIBED IN *ORMSBY v CAPITAL WELDING, INC*, 471 MICH 45 (2004)?

Plaintiff-appellant Louis Ghaffari answers “No.”

Defendant-appellant Turner Construction Company answers “Yes.”

Defendant-appellant Hoyt, Brum & Link answers “Yes.”

The trial court answers “Yes.”

The Court of Appeals answers “Yes.”

Amicus Curiae The Michigan Defense Trial Counsel answers “Yes.”

II.

IF SO, CAN SUCH AN APPLICATION OF THE OPEN AND OBVIOUS DANGER DOCTRINE BE RECONCILED WITH *HARDY v MONSANTO-CHEM SYSTEMS, INC*, 414 MICH 29 (1992) IN WHICH THE MICHIGAN SUPREME COURT CONCLUDED THAT THE POLICY OF PROMOTING SAFETY IN THE WORKPLACE WOULD BE ENHANCED BY THE APPLICATION OF PRINCIPLES OF COMPARATIVE NEGLIGENCE?

Plaintiff-appellant Louis Ghaffari answers “No.”

Defendant-appellant Turner Construction Company answers “Yes.”

Defendant-appellant Hoyt, Brum & Link answers “Yes.”

The trial court answers “Yes.”

The Court of Appeals answers “Yes.”

Amicus Curiae The Michigan Defense Trial Counsel answers “Yes.”

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Amicus Curiae Michigan Defense Trial Counsel adopts the statement of facts and proceedings set forth in defendants-appellees Turner Construction and Hoyt, Brum & Link's briefs on appeal.

STATEMENT OF THE STANDARD OF REVIEW

A trial court's determination of a motion for summary disposition is reviewed de novo. *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306, 317; 685 NW2d 221 (2004). This Court also reviews de novo a question of law such as whether the open and obvious danger doctrine applies to bar a plaintiff's claim. *Riddle v McClouth Steel Products*, 440 Mich 85, 95; 485 NW2d 676 (1992).

ARGUMENT I

THE OPEN AND OBVIOUS DANGER DOCTRINE MAY BE HARMONIOUSLY APPLIED TO BAR CLAIMS ARISING WITHIN A COMMON WORK AREA AS DESCRIBED IN *ORMSBY v CAPITAL WELDING, INC*, 471 MICH 45; 684 NW2d 320 (2004).

A. THE HISTORY OF THE OPEN AND OBVIOUS DANGER DOCTRINE SHOWS THAT IT SHOULD BAR LIABILITY ON THE PART OF A GENERAL CONTRACTOR REGARDLESS OF WHETHER A CLAIM HAS OCCURRED WITHIN A COMMON WORK AREA.

This Court has asked for a discussion of whether the open and obvious danger doctrine should have any application to a claim under the common work area doctrine as described in *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 684 NW2d 320 (2004). Review of the historical origins and function of these two doctrines sheds light on their relationship to each other and demonstrates that they may be harmoniously applied.

Modern common law torts are “the offspring of that prolific ‘action on the case’ which began to be developed in later years of the fourteenth century.” C H S Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949). Notions of negligence did not exist before the “evolution of Case.” *Id.* at 154. Courts “refused to recognize a landowner’s duty to protect visitors from dangerous conditions on the premises.” Shanda K. Pearson, *Justice in a Changed World: Lack of Special Relationships Not Special Enough to Relieve Landowners From Duty in Premises Actions*, 29 Wm Mitchell L R 1029 (2003). See also W Page Keeton et al, *Prosser & Keeton on The Law of Torts* 57 (5th ed, 1984), p 386. This reluctance to impose broad duties onto premises owners can be traced back to feudalism and the notion that an owner of property should have a safe haven on his own property into which the courts would not intrude. Pearson, at 1031-1034. It also stemmed from the traditional distinction in the law between misfeasance and malfeasance; courts did not recognize a duty to act to either protect or warn those coming onto property. The rule was traditionally announced as follows:

A party is not to cast himself upon an obstruction, which had been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.

Crommelin v Coxe & Co, 30 Ala 318; 1887 Ala LEXIS 94 (1857) quoting an early English decision, *Butterfield v Forrester*, 11 East 60 (1809). See also *Irwin v Sprigg*, 6 Gill 200, 1847 Md LEXIS 61 (1847). Liability was rarely imposed and those visiting the premises were expected to take care for their own safety.

Eventually, premises owners were held liable if they created a condition on the premises that amounted to a trap. See e.g., *Garrett v WS Butterfield Theatres, Inc*, 261 Mich 262; 246 NW 37 (1933); *Bauer v Saginaw County Agricultural Society*, 349 Mich 616; 84 NW2d 827 (1957). But premises owners were not liable for a naturally occurring trap, which existed in nature and was not created by the property owner or his agents. *WS Fowler Rental Equipment Co v Skipper*, 276 Ala 593; 165 So2d 375 (1963) quoting *Haywood v Drury Lane Theatre*, 2 KB 899, 914 (1917). Modern courts gradually recognized a sliding scale of landowner duties based upon the status of the person coming onto the land, invitee, licensee, or trespasser. Keeton, *supra*, at 386-450.

But despite this gradual recognition of a premises action, since the 1800s and before, Michigan appellate courts have declined to impose tort liability onto the premises owner or occupier of land for open and obvious dangers. See e.g., *Caniff v Blanchard Navigation Co*, 66 Mich 638; 33 NW 744 (1887); *Garrett v WS Butterfield Theatres, Inc*, 261 Mich 262; 246 NW57 (1933). In *Caniff v Blanchard Navigation Co*, 66 Mich 638; 33 NW 744 (1887), for example, this Court denied the plaintiff a cause of action against his employer because the danger that injured the plaintiff, an open hatch on a ship, was not hidden to the injured party. The Court explained:

The occupier of premises, no doubt, is bound, as to persons thereon by his express or implied invitation, to keep the premises free from, or give a warning of, danger

known to him and unknown to the visitor. But this rule has no application to a case where a person who from his experience, through many years, in sailing a vessel, knows that it is customary to leave the hatchways of vessels open while lying in port, and whom observation teaches that they are liable to be open rather than closed, and are sources of danger which he must avoid at his peril.

Caniff at 647. As explained in *Caniff*, the purpose behind the doctrine is to encourage safety by requiring that people watch out for their own safety, whether in the workplace or elsewhere.

Only if a person cannot protect him or herself from dangers arising from the condition of the premises does the premises owner or person in control have a duty to warn or protect from such dangers.

The doctrine has been used by Michigan courts for over fifty years. In 1933, this Court applied it to a negligence case, in *Boyle v Preketes*, 262 Mich 629; 247 NW 763 (1933). There, this Court affirmed a directed verdict in favor of the defendant regarding claims of failure to warn, failure to maintain sufficient lighting, and placing distracting showcases in a store at a point of danger. The *Boyle* court did so because the change in floor level was not concealed. *Id.* The Court emphasized that the incident “belongs to that class of ordinary accidents which ought to be imputed to the carelessness or misfortune of the sufferer.” 262 Mich at 635 quoting *Davis v Buss Machine Works*, 169 Mich 498, 500; 135 NW 303 (1912). Similarly, in *Garrett v WS Butterfield Theaters, Inc*, 261 Mich 262; 246 NW (1933), this Court reversed a jury verdict in the plaintiff’s favor because a “reasonably prudent person watching where he was going would have seen the step” to an adjoining step-down toilet room. 261 Mich at 264.¹

¹The Court of Appeals has consistently applied these principles. In *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999), the Court of Appeals consistently applied the *Riddle* expansion of the open and obvious danger doctrine and applied the doctrine not only to claims that a defendant failed to warn of a dangerous condition but to claims that the defendant “breached a duty in allowing the dangerous condition to exist in the first place.” *Millikin* at 495. In making this conclusion, the *Millikin* court cited *Boyle v Preketes*, 262 Mich 629; 247 NW 763 (1933), and *Garrett v WS Butterfield Theatres, Inc*, 261 Mich 262; 246 NW 57 (1933), both of which were cited with approval in *Bertrand*, 449 Mich at 614-615. (Continued on next page.)

More recently, the open and obvious danger doctrine was applied by this Court in *Riddle v McLouth Steel Products, Corp*, 440 Mich 85; 485 NW2d 676 (1992). There, the plaintiff, an independent contractor's employee, slipped on oil in his work area. The plaintiff sued the premises owner, alleging that the owner had a duty to warn. Although the *Riddle* court acknowledged that a premises owner had a common law duty to warn against unreasonable hazards, the open and obvious danger doctrine's history makes clear that no duty to warn exists as to open and obvious dangers. The *Riddle* court discussed *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244; 235 NW2d 732 (1975), and the rule set forth in Restatement of Torts, 2d, § 343, both of which embody this limitation. Section 343 provides, in relevant part, "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he . . . should expect that they will not discover or realize the danger" The *Riddle* court reiterated that in *Williams v Cunningham Drug Stores, Inc*, 29 Mich 495; 418 NW2d 381 (1988), it had held that "a possessor of land does not owe a duty to protect his invitees . . . [from] dangers that are so obvious and apparent that an invitee may be expected to discover them himself." The *Williams* court also quoted Restatement of Torts, 2d, § 343A, which extended the open and obvious danger doctrine to activities, not just conditions, on the premises, "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them"

(Continued from previous page.)

On the basis of this precedent, the *Millikin* court held that the open and obvious danger doctrine applies whenever injury could have been avoided due to the open and obvious nature of the hazard, regardless of the theory of liability a plaintiff presents:

The logic of these cases, as well as the language they employed, demonstrates that the doctrine protects against liability whenever injury would have been avoided had an "open and obvious" danger been observed, regardless of the alleged theories of liability. [*Id.* at 497.]

In line with these precedents, the *Riddle* court taught that the well-established rule that there is no duty to warn of open and obvious dangers is a “defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case.” *Riddle* at 95-96. The open and obvious danger doctrine only negates the duty element if the danger presented does not have special aspects that make it “unreasonably dangerous,” as set forth in *Bertrand v Alan Ford, Inc.*, 449 Mich 606; 537 NW2d 185 (1995). *Id.* at 497, n 5. In *Bertrand*, this Court expounded on the “exception” to the open and obvious rule, which is that even if a danger is open and obvious, “special aspects” of a condition may make the risk unreasonable, and result in the imposition a duty to protect on the premises owner. *Bertrand* at 614.

Most recently, in *Lugo v Ameritech Corp, Inc.*, 464 Mich 512; 629 NW2d (2001), this Court expressly explained that “the open and obvious danger doctrine should not be viewed as some type of “exception” to the duty generally owed invitees, but rather as an integral part of the definition of that duty.” The *Lugo* court also elaborated on the *Bertrand* “special aspects” analysis, stating that if a danger is labeled open and obvious,

[T]he critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly “special aspects” of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the ‘special aspect’ of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.

Lugo at 517-518.

The Court then listed two scenarios that exemplify a special aspect that makes a condition “unreasonably dangerous.” First, the Court discussed a scenario where the only exit of a commercial building contains standing water, requiring an invitee to encounter the condition without alternative. In this situation, the Court reasoned that though the condition is open and obvious, its “special aspects” make the condition “unavoidable” and thus it may pose an unreasonable risk of harm. *Id.* at 518. Second, the Court discussed a scenario where the

premises contains “an unguarded thirty foot deep pit” in a parking lot. This condition, the Court explained, even though open and obvious and avoidable, presents “such a substantial risk of death or severe injury” to one who falls into the pit that it would be unreasonably dangerous to maintain. *Id.*

Summarizing its ruling, the *Lugo* court held that “only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk if not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Id.* at 519. Under the *Riddle*, *Bertrand*, *Millikin*, and *Lugo* case law, the open and obvious danger doctrine is an aspect of analyzing the duty element of a prima facie case of negligence, regardless of the nature of the premises. It applies equally to construction site or factory or farm.

B. THE COMMON WORK AREA DOCTRINE IS A JUDICIALLY-CREATED VEHICLE TO ALLOW CLAIMS OF WORKERS AND OTHERS AGAINST THE OWNER OR GENERAL CONTRACTOR WHEN READILY OBSERVABLE, AVOIDABLE DANGERS CREATE A HIGH RISK TO A SIGNIFICANT NUMBER OF WORKERS.

The general rule at common law was that property owners and general contractors owed no duty to independent subcontractors or their employees for injuries resulting from the negligent conduct of independent subcontractors or their employees. *Funk v General Motors Corp*, 392 Mich 91, 104-105; 220 NW2d 641 (1974). At early common law, neither the premises owner nor the general contractor could be held liable for the negligent acts of an independent contractor. *DeForrest v Wright*, 2 Mich 368 (1852) (“The rule now seems very clearly to be this, that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoing of the former.”) *Id.* But this rule quickly gave rise to a number of exceptions including the inherently dangerous activity exception, *Rogers v Parker*, 159 Mich 278; 123 NW 1109 (1909), and the retained control exception, which initially allowed for claims by third parties, *Detroit v Corey*, 9 Mich 165

(1861). These early decisions did not allow recovery for injury sustained by the employees or agents of an independent contractor. *Cory v Thomas*, 345 Mich 616; 76 NW2d 817 (1956); *Barlow v Krieghoff Co*, 310 Mich 195; 16 NW2d 715 (1944).

This Court in *Funk*, *supra*, “set forth a new exception to this general rule of nonliability, holding that, under certain circumstances, a general contractor could be held liable under the ‘common work area doctrine.’” *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004).² The *Funk* court extended the common work area doctrine to allow negligence suits to be brought against an entity that did not own the premises on the basis that an owner or general contractor, who retains control has sufficient control over the workplace in a construction setting to give rise to an actionable duty. The common work area doctrine allows liability to be imposed against the owner or general contractor in similar situations to those in which liability may be imposed upon a premises owner. The rules are basically the same.

The common work area exception to the general no-duty rule as it stands after *Ormsby*, is:

To establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.

Ormsby, *supra* at 57, citing *Funk*, *supra* at 104. The common work area doctrine is an exception to the general contractor and owner no-duty rule as announced in *Funk*, *supra*. In *Funk*, the plaintiff, a plumber, was injured on a construction job when he fell after he opened and slipped

²This Court expressed no opinion concerning whether an exception to the general rule of nonliability applies to extend recovery to the employees of independent contractors in *DeShambo v Nielson*, 471 Mich 27, 40 n 6; 684 NW2d 332 (2004). The validity of *Funk* and *Plummer v Bechtel*, 440 Mich 646; 489 NW2d 66 (1992) (which was a plurality decision) have not been challenged by the parties. Thus, the Michigan Defense Trial Counsel does not address the issue, but urges this Court to explicitly announce that it was not asked to decide and is not deciding that question.

through a roof opening. The defendants were the general contractor and the owner of the plant. The plaintiff sued the defendants, alleging they were negligent in failing to implement reasonable safety precautions for men working thirty-feet or higher above the ground. The issue was whether the defendants, who had failed to provide any safety equipment, had the duty to supply safety equipment. *Funk, supra* at 102.³ The *Funk* court noted that accidents are likely to occur on construction sites and no one can completely avoid them from happening. “Mishaps and falls are likely occurrences in the course of a construction project. To completely avoid their occurrence is an almost impossible task.” *Id.* at 102. The *Funk* court also noted that safe working conditions can reduce their occurrence. “However, relatively safe working conditions may still be provided by implementing reasonable safety measures . . .” *Id.* at 102-103.

The *Funk* court turned to the safety problem at issue, which was the general contractor’s failure to provide safety equipment, not a condition on the land:

The plumbing subcontractor’s failure to provide safety equipment for the men working along the steel did not represent just an occasional lapse. The steel frame was a common work area of many trades. . . . Throughout the especially precarious winter months, when snow and ice made conditions even more hazardous, and subsequently, closer in time to [the plaintiff’s] injury, it was obvious to even the most casual observer that the men in the steel were without safety harnesses or belts and there was no safety net under the men.

Id. at 103. In the *Funk* court’s view, putting ultimate responsibility for job safety in common work areas on the general contractor where such a need is observable and the failure to do so presents a high risk to a large number of workers would encourage general contractors to implement the needed safety equipment in those areas. *Id.* at 103. To support this statement, the Court quoted the following passage from a California case:

³At issue in *Funk* was also the corporate landowner’s liability and whether it had retained enough control to be treated as a general contractor and subject to the common work area doctrine. The defendant here is the general contractor, thus, discussion of the landowner’s liability is irrelevant.

[A]s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. . . . [I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so.

Id. at 104, quoting *Alber v Owens*, 427 P2d 781 (Cal, 1967). Based on this rationale, the *Funk* court decided to impose a duty on general contractors for readily observable, high risk job safety hazards in the workplace.

The *Funk* court announced the common work area doctrine exception to the general no-duty rule for general contractors:

We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.

Id. at 104. The rule is an extension of the longstanding rule that, where a subcontractor erects a scaffold for common use or allows its equipment or apparatus on a construction site, it will be liable if the parties had a common interest or mutual advantage in jointly using the equipment. See generally Noralyn O Harlow, *Duty & Liability of Subcontractor to Employee of Another Contractor Using Equipment or Apparatus of Former*, 55 ALR 4th 725 (2004); J E Macy, *General Contractor's Liability For Injuries to Employees of Other Contractors on the Project*, 20 ALR2d 868 (2005). See also *Munson v Vane-Stecker Co*, 347 Mich 377; 79 NW2d 855 (1956) (employee of subcontractor entitled to recover against different subcontractor on basis of mutual advantage test). Regardless of whether *Funk* and *Plummer* should be reaffirmed by this Court, the common work area doctrine should not be read to replace Michigan's longstanding acceptance of the open and obvious danger doctrine.

C. THE OPEN AND OBVIOUS DANGER DOCTRINE SHOULD APPLY TO BAR CLAIMS OF WORKERS AND THIRD PARTIES ARISING IN A COMMON WORK AREA.

General contractors, like premises owners and possessors, may invoke the open and obvious danger doctrine to attack the duty element in a construction site negligence case arising out of dangerous conditions or activities on the premises. The common work area doctrine, as set forth in *Funk, supra* and *Ormsby, supra*, imposes no greater duty upon a general contractor to protect its independent subcontractors on the job site than the duty on premises possessors to protect their invitees.⁴ Thus, the open and obvious danger doctrine and the common work area doctrine can be harmonized.

First, no express law states that the open and obvious danger doctrine is limited to negligence cases arising in the premises liability context only. To the contrary, this Court has consistently expanded the open and obvious danger doctrine's application and has expressly stated that it should be applied to attack the duty element of any *prima facie* negligence case. *Riddle, supra* at 95-96.

Second, the types of dangers that provoke a duty under either doctrine are the same. The open and obvious danger doctrine imposes a duty to protect when the premises possessor knows of (or should know of) hazards that are open and obvious but unreasonably dangerous. Similarly, the common work area doctrine imposes a duty to protect where the general contractor knows of a hazard, because it is readily observable, and the hazard presents a high risk of danger to numerous workers. Both doctrines are consistent in that they impose a duty if the hazard presents a high risk of danger to numerous workers (the common work area doctrine) or is unreasonably dangerous (open and obvious danger doctrine exceptions).

⁴This is made clear in Restatement Torts, 2d, § 384, Comment h, which notes that a general contractor is subject to the same liability for harm done as though he were the possessor of the land. ("As is stated in this Section, one who, as servant or contractor, erects a structure or changes the condition of land on behalf of the possessor, is subject to the same but no greater liability for bodily harm done to others while he remains in charge of the work as though he were the possessor of the land.").

Third, the common work area doctrine was created to impose liability upon a general contractor when he or she fails to implement safety precautions in the work place and that presents a high risk of danger to numerous workers. This is because the workers, even if they are aware of the missing safety precautions, are not in as good a position to avoid potential injury from the danger because they cannot always protect themselves from the hazard, fix it, or compel their superiors, the general contractors, to do so. *Funk, supra*. The general contractors are typically in the better position. *Id.* The open and obvious danger doctrine imposes liability based on a similar policy—that the hazard is such that invitees cannot protect themselves from the hazard because he or she cannot appreciate the danger and act to avoid resulting injury. As the *Bertrand* court explained, the invitor is in a better position to control safety aspects of his or her property when his invitees entrust their own protection to him or her while entering his or her property. *Bertrand, supra* at 606. Thus, where the workers cannot protect themselves from a high risk or unreasonably dangerous hazard, whether it is observed or not, the open and obvious danger doctrine would not apply and the question would be whether the general contractor owes a duty under the common work area doctrine. *Funk* created a duty when the hazard is readily observable and presents a high risk of danger to numerous workers.

Fourth, applying the open and obvious danger doctrine in the common work area context will promote the public policy that encourages people to look where they are going and to take reasonable precautions for their own safety on the job site where workers are able to protect themselves, the law should encourage care. Duties should be imposed where workers cannot take such precautions. See, e.g., *Bertrand* at 616.

Finally, plaintiff's repeated reliance on MIOSHA violations as barring application of the open and obvious danger doctrine is misplaced. This is because the plain language of MIOSHA provides that all common law defenses, which includes the open and obvious danger doctrine,

are still applicable, thus indicating the Legislature's intent to preserve the common law defense of open and obvious. MCL 408.1002(2) provides:

Nothing in this act shall be construed to supersede or in any manner affect any workers' compensation law, or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

This Legislature has the constitutional power to change common law. *Placek v Sterling Heights*, 405 Mich 638, 656-657; 275 NW2d 511 (1979), citing Const 1963, art 3, § 7. Here, by using express language in this statute stating that the common law rights are not diminished, the Legislature clearly intended not to invoke its constitutional right to change the common law by enacting § 1002(2) but rather, to preserve the common law rights, including the open and obvious defense to negligence cases.

Furthermore, MIOSHA regulations do not create a private right of action. *White v Chrysler Corp*, 421 Mich 192, 199; 364 NW2d 619 (1984). Rather, MIOSHA requires an aggrieved employee to follow administrative processes to investigate the allegations. MCL 408.1082. If a violation is found, then the Department of Labor and Economic Growth may impose a monetary penalty upon the employer. MCL 408.1033; MCL 408.1035. Also, this Court has held that MIOSHA regulations do not impose a statutory duty but simply provide evidence of negligence. *Douglas v Edgewater*, 369 Mich 320, 328; 119 NW2d 567 (1963). Thus, plaintiff cannot rely upon MIOSHA regulations to preclude application of the open and obvious danger doctrine.

A workable rule applying the open and obvious danger doctrine to a case where the common work area doctrine is raised is readily available. If an activity or condition on the job site presents a danger that the independent contractors or their employees can appreciate and protect themselves against using the open and obvious danger standard (i.e., an average person of

ordinary intelligence could appreciate) and the danger is not unreasonably dangerous, then it is open and obvious and no duty is owed. This open and obvious danger doctrine applies to bar claims of employees of contractors and subcontractors working on the site and of any third parties who may be injured on the site. If an activity or condition on the job site presents a danger that the independent contractors or their employees cannot appreciate and protect themselves against, it is not open and obvious, in that case, the next question is whether the common work area elements apply, i.e., is it readily observable, avoidable, and does it present a high risk of danger to a significant amount of workers. If so, then the general contractor has a duty. If the danger on the site is something all persons can appreciate and protect themselves against, i.e., large pipes on the ground that can be walked around, then it falls within the bar created by the open and obvious danger doctrine and no duty imposed on the general contractor. If the danger on the site is something that not all persons can appreciate and protect themselves against, i.e., no safety panels on electrical boards or no safety helmets and belts on the workers using high scaffolds or walking the beams, then it is not open and obvious and the remaining common work area elements such as “high risk” to a significant amount of workers) must be established.

ARGUMENT II

APPLICATION OF THE OPEN AND OBVIOUS DANGER DOCTRINE CAN BE RECONCILED WITH *HARDY v MONSANTO-CHEM SYSTEMS, INC*, 414 MICH 29 (1992) IN WHICH THE MICHIGAN SUPREME COURT CONCLUDED THAT THE POLICY OF PROMOTING SAFETY IN THE WORKPLACE WOULD BE ENHANCED BY THE APPLICATION OF PRINCIPLES OF COMPARATIVE NEGLIGENCE.

A. RIDDLE AND LUGO’S ARTICULATION OF THE OPEN AND OBVIOUS DANGER DOCTRINE MAKES CLEAR THAT IT ADDRESSES DUTY.

Applying the open and obvious danger doctrine to situations where the common work area doctrine has been asserted is reconcilable with the principle announced in *Hardy v Monsanto-Chem Systems*, 414 Mich 29; 323 NW2d 270 (1982) that comparative negligence promotes safety in the workplace. This is because open and obvious danger doctrine and comparative negligence are distinct doctrines used at different stages in determining liability in a negligence case. The open and obvious danger doctrine applies to determine whether a duty exists. Comparative negligence applies after it is determined that a duty is owed to apportion liability among the parties based on their comparative fault. Thus, applying the open and obvious danger doctrine to cases where the common work area is asserted is consistent with the *Hardy* principle that comparative negligence applies in such cases as well.

B. THE OPEN AND OBVIOUS DANGER DOCTRINE MAY THEREFORE BE APPLIED CONSISTENTLY WITH USE OF COMPARATIVE NEGLIGENCE PRINCIPLES, WHICH ALLOCATE CAUSAL FAULT.

The *Hardy* decision, which indicated that comparative negligence promotes workplace safety, did not ban application of the common law defense of open and obvious in construction site cases. This is because comparative negligence and open and obvious are consistent doctrines, as this Court has already recognized. In *Riddle, supra*, this Court held that the “no duty to warn of open and obvious danger” is consistent with comparative negligence. The *Riddle* court held:

The adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. Moreover, we find that the duty element and the comparative negligence standard are fundamentally exclusive - - two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action.

Riddle at 95. In coming to this conclusion, the *Riddle* court first recognized that the open and obvious danger doctrine is a “defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case.” *Id.* To the contrary, the *Riddle* court explained, comparative negligence is an affirmative defense that Michigan adopted to “promulgate a ‘fair system of apportionment of damages.’” *Id.* at 98, quoting *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979). Before comparative negligence was adopted, Michigan followed the doctrine of contributory negligence, which wholly precluded a plaintiff from bringing a negligence claim if the plaintiff was negligent. *Id.* With the adoption of comparative negligence and the abolition of contributory negligence, the *Riddle* court continued, a defendant may present evidence of a plaintiff’s negligence not to bar the claim but to reduce his own liability. *Id.* Thus, the *Riddle* court explained, the adoption of comparative negligence merely limited a defendant’s defenses; it did not alter the defendant’s initial duty.⁵ *Id.*

Further, even though the open and obvious issue may raise fact issues for the jury, the jury is still only considering whether a duty exists, not whether the remaining elements, i.e., breach of standard of care or causation, exists, which are relevant to comparative negligence

⁵The *Riddle* court relied on Judge Sawyer’s discussion of comparative negligence in *Pressley v Bruce Post VFW Memorial Home, Inc*, 185 Mich App 709, 712-713; 462 NW2d 830 (1990), in which he stated:

comparative negligence does not itself directly involve issues of duty or breach of duty. Rather, it deals with the proper and just apportionment of fault, and responsibility, where both the plaintiff and the defendant are negligent. Comparative negligence does not, however, create negligence where none existed before that doctrine was adopted. That is, the adoption of comparative negligence did not create duties where none existed before.

determinations, exist. Thus, there is no inconsistency between application of the two doctrines, even where factual issues are raised.

Accordingly, application of the open and obvious danger doctrine can be reconciled with this Court's determination in *Hardy* that comparative negligence apply in construction work site settings.

RELIEF

WHEREFORE, Amicus curiae Michigan Defense Trial Counsel respectfully requests that this Court affirm the lower court rulings and grant relief as requested by the defendants-appellants.

Respectfully submitted,

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